84-5



No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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EDNA GOLDSTEIN,

*Petitioner,*

v.

ROBERT E. KELLEHER, ROCKDALE MEDICAL CORPORATION and UNITED STATES OF AMERICA,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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SKIP SHORT
*Counsel of Record*
SHORT & BILLY
275 Madison Avenue
New York, New York 10016
(212) 679-8400

JOHN GRANARA
5 High Street
Medford, Massachusetts 02155
(617) 391-7000

## Question Presented for Review

Is 28 U.S.C. §636(c), which permits magistrates to conduct civil trials and enter judgments, although magistrates are not appointed by the President and confirmed by the Senate and do not have the attributes of Article III judges, constitutional?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Edna Goldstein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered February 29, 1984 and the order entered April 3, 1984.

### Report of Opinions

The opinion of the Court of Appeals is reported at 728 F.2d 32 (1984).

### Jurisdiction

The opinion, order and judgment of the First Circuit sought to be reviewed were entered on February 29, 1984 and on April 3, 1984 (order denying petition for rehearing). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### Constitutional and Statutory Provisions Involved

U.S. Constitution, Article II, Section 2 provides:

> (2) He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties provided two

> thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Constitution, Article III, Section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. §631 provides in relevant part:

> (a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by

the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individual as a part-time magistrate shall be for a term of four years. . . .

(i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

28 U.S.C. §636 provides in relevant part:

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this

subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

## Statement of the Case

Edna Goldstein commenced a diversity action against Robert E. Kelleher and his medical corporation, Rockdale Medical Corporation, for medical malpractice. The action was filed in the United States District Court for the District of Massachusetts in January of 1981.

In March of 1983, District Court Judge Tauro suggested that the case be referred to a magistrate and the parties agreed to the reference.

A jury trial was held before Magistrate Robert J. DeGiacomo in April of 1983. The jury rendered a verdict that Dr. Kelleher was negligent in his treatment of Edna Goldstein, but that his negligence caused no injury or damage. Magistrate DeGiacomo then entered judgment for the defendants.

On appeal, the Clerk of the First Circuit certified to the the Attorney General that an Act of Congress had been drawn in question. The Court then granted the motion to intervene of the United States.

In its decision, the First Circuit held 28 U.S.C. §636(c) to be constitutional.

## REASONS FOR GRANTING THE WRIT

### 1. *This Case Presents an Important Question of Constitutional Law*

In this case a federal court of appeals has decided an important question of constitutional law which has not been, but should be, settled by this Court. Further, the decision of the First Circuit conflicts with applicable decisions of this Court and with a decision of the Fifth Circuit.

The First Circuit held in this case that the consensual delegation of authority to a magistrate to try civil cases and to direct the entry of judgments, pursuant to 28 U.S.C. §636(c), was constitutional.

This decision permits an alteration by Congress of the system of checks and balances and the frame of government. The decision is thus of fundamental importance to the purpose and authority of the Constitution as the governing document in our system of law.

This decision conflicts with basic constitutional principles and with the decisions of this Court in *United States* v. *Raddatz*, 447 U.S. 667 (1980); and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).[1]

The First Circuit also approved the practice of allowing the judge instead of the clerk of the court to suggest the reference to the parties. This decision is in conflict with *Glover* v. *Alabama Bd. of Corrections*, 660 F.2d 120 (5th Cir., 1981).

### 2. *Constitutional Provisions Prescribing Separation of Powers and Creating a System of Checks and Balances Cannot Be Changed by an Act of Congress*

28 U.S.C. §636(c) is unconstitutional because it is an attempt by Congress to unilaterally alter the Constitution and the framework of government that it establishes.

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[1] Four other circuits have upheld the constitutionality of 28 U.S.C. §636(c), *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir., 1983); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir., 1984) (en banc) *reversing* 712 F.2d 1305 (9th Cir., 1983); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir., 1984); and *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir., 1984). Petitions for certiorari have been filed in *Pacemaker* (No. 83-1873) and *Collins* (No. 83-1616).

The Constitution establishes the limits of the three branches of government and creates an institutional system of checks and balances to secure the framework of government that it establishes and to protect the people from the improvident exercise of power. This Court explained in *I.N.S.* v. *Chadha,* —— U.S. ——, 103 S.Ct. 2764 (1983) that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." [at 2781, quoting *Buckley* v. *Valeo,* 424 U.S. 1, 124 (1976)] "TheConstitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." (*I.N.S.* v. *Chadha, supra,* at 2784)

These provisions delegating and separating powers in Articles I, II and III are the fundamental cornerstones of the framework of our government. These provisions create a delicate balance in which the powers of each branch are defined, limited and made subject to checks and balances exercised by the other branches.

These provisions can be changed only by the mechanism established in Article V of the Constitution. No branch of government can unilaterally alter this framework of government and the distribution of powers.

The checks and balances between all three branches, however, are changed by Section 636(c)(3) of the Federal Magistrate Act of 1979, 28 U.S.C. §636(c)(Supp V 1981), which permits magistrates to exercise the judicial power that is constitutionally reserved for Article III judges. This Act diminishes the appointment power of the President (Article II, §2) and the confirmation power of the Senate (Article II, §2), and violates the guarantees of life tenure and salary protection provided in Article III to the judges who exercise the judicial power of the United States. Because the Federal Magistrate Act of 1979 conflicts with Articles II and III and seeks to change the express provisions concerning the distribution and separation of powers, it is unconstitutional.

**2A.** ***Statutory Background***

The Federal Magistrate Act of 1979 expanded the powers of magistrates by providing them with case dispositive jurisdiction, including the power to enter judgment, upon consent of the parties in civil cases, while eliminating the requirement of de novo district court review [28 U.S.C. §636(c)(Supp V 1981)]. The intent of this change was to provide magistrates with "explicit authorization to finally decide civil cases" [H.R. Rep. No. 287, 96th Cong., 1st Sess. (1979), Sen. Rep. No. 74, 96th Cong., 1st Sess. 4 (1979), *reprinted in* U.S.C. Cong. & Admin. News, 96th Cong., 1st Sess. 1469, 1473 (1979)] and to permit them "to sit in lieu of . . . district court judge[s]" [Advisory Committee Note of 1982, Federal Rule of Civil Procedure 73, 90 F.R.D. 498 (1982)].

Underlying the expansion of the magistrates' authority was the need for additional judges, *Mathews* v. *Weber,* 423 U.S. 261, 268 (1976). Congress, however, chose not to appoint sufficient judges to keep pace with the expanding caseload. (See, e.g., Chief Justice Burger's 1983 Year-End Report on the Judiciary, 13-14.) Instead of appointing sufficient Article III judges, Congress expanded the authority of magistrates. [See H. R. Rep. No. 1364, 95th Cong., 2d Sess., 35 (1978) (dissenting views of Reps. Drinan & Kindness)]

This expansion of magistrates' authority changed the character of a federal magistrate from the adjunct who assisted the Article III judge in *Mathews* v. *Weber,* and *United States* v. *Raddatz,* 447 U.S. 667 (1980) to a substitute decisionmaker intended by Congress to act in place of Article III judges.[2] This change altered the definitions and limits of power set forth in the first three articles.

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[2] The "Act essentially vests magistrates with full judicial power and makes them complete substitutes for article III district judges", Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 567 (1980), J. Aug, Jr., The Magistrate Act of 1979: From A Magistrate's Perspective, 49 Cinn. L. Rev. 363, 376 (1980); Advisory Committee Note of 1982, Federal Rule of Civil Procedure 73, 90 F.R.D. 498 (1982).

First, magistrates are appointed by the judges of the district court (28 U.S.C. §631). They are not nominated by the President and confirmed by the Senate.

Second, magistrates' salaries are governed by the statute and the judicial conference. 28 U.S.C. §634 currently provides that a magistrate's salary shall not be reduced during a term below the salary fixed for him at the beginning of that term. Congress may, however, change §634 to modify or abolish this provision. The Article III guarantee of undiminished compensation is not provided.

Third, magistrates are appointed only for 4 or 8 years [28 U.S.C. §631(e)], must retire at age 70 [28 U.S.C. §631 (d)], may be removed by the judges of the district court for "incompetency, misconduct, neglect of duty, or physical or mental disability" [28 U.S.C. §631(i)], may be removed "if the conference determines that the services performed by his office are no longer needed" [28 U.S.C. §631(i)] and may be removed if Congress alters the statute. Magistrates do not have the life tenure guaranteed to those judges who exercise the judicial power by Article III.

**2B.** ***The Act Infringes Upon the President's Authority to Appoint and the Senate's Power to Confirm Federal Judges***

The infringement upon the President's appointment power and the Senate's confirmation power was effected unintentionally. At no time did Congress declare that it was its intention to transfer to the district courts the authority to appoint and confirm those judges who wield the federal judicial power. Instead, Congress assumed that under the Magistrate Act of 1979 the magistrate would act only as an "adjunct" to the district court, "subject to the court's direction and control" [H. Rep. No. 287, 96th Cong., 1st Sess., 8-9 (1979)],[3] as magistrates had been considered to act under the Magistrates Act of 1968.

However, *United States* v. *Raddatz* and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) have demonstrated this assumption to be incorrect.

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[3] Representatives Drinan & Kindness criticized this position, H.R. Rep. No. 1364, 95th Cong., 2d Sess., 36-37 (1978) (dissenting views).

A magistrate, who pursuant to the Magistrate Act of 1979 exercises "case dispositive jurisdiction" and makes the ultimate decision in a case, acts not as an adjunct; he acts as the judge.[4]

Once *Raddatz* and *Northern Pipeline* rejected the theory that a decisionmaker could exercise case dispositive jurisdiction and still be merely an adjunct, it became clear that Congress had unintentionally transferred the authority to appoint and confirm the judges who wield the Article III judicial power from the President and the Senate to the district courts.

Since this structural rearrangement was not expressly intended by Congress, no claim was made by Congress that such a change could or should be made. However, in an attempt to sustain the constitutionality of the Act, the Ninth Circuit *en banc*, in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir., 1984) (en banc) *reversing* 712 F.2d 1305 (9th Cir., 1983) claimed that Congress could have transferred this power to the district courts. The panel argued that Article II, Section 2 permits the courts to appoint its own officers, including magistrates who act as de facto judges.

Article II, Section 2 provides that "the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments."

Unlike the *Pacemaker* majority, however, Congress never claimed it could vest or was vesting the authority to appoint Article III decisionmakers—the equivalent of district court judges—in other district court judges.

Because Congress has never claimed that district court judges could be appointed by other district court judges, this issue has never been directly addressed by this Court. Nevertheless, the records of the Constitutional Convention and opinions of this Court refute this position.[5]

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[4] See pp. 8, 21-23 herein and fn. 2 herein.

[5] Professor Shartel once argued that the Supreme Court could constitutionally appoint the judges of the circuit and district courts, B. Shartel, Federal Judges—Appointment, Supervision, and Re-

Although the method of the selection of the judiciary was often discussed at the Constitutional Convention [See, e.g., 1 M. Farrand, The Records of the Federal Convention of 1787, 119-120 (1911), 2 M. Farrand, The Records of the Federal Convention of 1787, 41-44, 52 (1911)], at no time was it proposed that sitting judges appoint and confirm other judges.

Article II, section 2 provides the President with the authority to nominate "Judges of the Supreme Court" and "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law". It is apparent from a review of the constitutional records that only the Supreme Court was specifically included because the district courts did not exist until they were later created by Congress.

On June 4, 1787, a resolution passed providing for the establishment of a "National Judiciary" to "consist of one supreme tribunal, and of one or more inferior tribunals." Debates in the Federal Convention of 1787, 56 (G. Hunt & J. Scott, ed., 1920). The debate then proceeded to whether "the National Judiciary" should be appointed by the legislature or the executive. *Id.*, 56-57. Subsequently, a motion passed giving the legislature the discretion to establish inferior courts, without making their creation mandatory. *Id.*, 60-62. Accordingly, the Committee on Detail (July 24-26) referred to the appointment of the inferior tribunals only parenthetically. In one draft it provided:

5. The Judiciary
    1. shall consist of one supreme tribunal
    2. the judges whereof shall be appointed by the senate
    3. and of such inferior tribunals, as the legislature may (appoint)(establish)

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moval—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 485 (1930). This contention is contrary to the constitutional history and this Court's opinions concerning related issues. Nevertheless, even this construction would not support an unintended transfer by Congress of this authority to district courts to appoint their own judges.

(4. the judges of which shall be also appointed by the senate—)

5. all the judges shall hold their offices during good behavior;

2 M. Farrand, The Records of the Federal Convention of 1787, 146 (1911).[6]

The appointment provision then evolved (September 7, 1787) to provide that the President would nominate with the advice and consent of the Senate the Judges of the Supreme Court "and all other officers". Debates in the Federal Convention of 1787, 529 (G. Hunt & J. Scott, ed., 1920).

Thereafter, the provision permitting Congress to vest the appointment of inferior officers "in the President alone, in the courts of law, or in the heads of departments" was added. Madison referred to these inferior officers as "the lesser offices". *Id.*, at 572.

Throughout the evolution of this provision, no discussion whatsoever took place suggesting that judges of the inferior tribunals were intended to be appointed in a way different than the Supreme Court judges. See also W. Meigs, The Growth of the Constitution, 224-227 (1900).

Justice Story explained that although this issue has not been raised, the "practical construction has uniformly been" that judges of the lower federal courts must be appointed by the President, 2 J. Story, Commentaries on the Constitution of the United States, 400, fn. 2 (1873). See also *Id.*, at 389, fn.; Constitutional Bankruptcy Courts, Staff Report of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 6 (1977).

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[6] The Virginia Plan had also proposed that "there was to be a national judiciary, of a supreme and inferior courts, chosen by the legislature . . . " M. Farrand, The Framing of the Constitution 70 (1913). Farrand refers to the "judiciary" when discussing the appointment of judges, without any distinction between the supreme and inferior courts. *Id.*, at 79, 119, 155.

Similarly, when Congress established the judicial courts of the United States in 1789, it provided the district courts with the authority to appoint their clerks, but not their judges. [See *Ex Parte Hennen,* 38 U.S. (13 Pet) 230, 258 (1839).]

While this Court has considered only related issues, its decisions indicate that those judges who exercise the Article III judicial power must be appointed by the President and confirmed by the Senate. In *Ex Parte Hennen,* while sanctioning the district courts' power to appoint and remove its clerks, the Court stated that inferior officers that need not be appointed by the President are not those held for life (at 259) and such inferior officers may be removed by the appointing authority (at 260). See also *Myers* v. *United States,* 272 U.S. 52, 130-131, 161 (1926), *Shurtleff* v. *United States,* 189 U.S. 311, 315 (1903).

No other rationale has been offered to support this alteration of the Constitutional framework and this violation alone renders 28 U.S.C. §636 unconstitutional.

### 2C. *The Act Violates the Article III Guarantees of Life Tenure and Salary Protection*

Article III requires that the judges exercising its power shall be guaranteed life tenure, subject only to removal for impeachment, *Toth* v. *Quarles,* 350 U.S. 11 (1955); and shall be guaranteed a fixed and irreducible compensation for their services, *United States* v. *Will,* 449 U.S. 200 (1980).

Clearly, the Magistrate Act has not provided magistrates with these constitutional guarantees. Magistrates lack constitutional salary protection, are appointed for only 4 or 8 years, must retire at age 70, may be removed by the district court, and may have their positions abolished by the district court or by Congress. See p. 9 herein.)

Yet, because the Federal Magistrate Act of 1979 both authorizes magistrates to exercise case dispositive jurisdiction, including the entry of final judgment, and eliminates de novo review by the district court, magistrates now exercise the judicial power of the United States.[7]

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[7] See H. R. Rep. No. 287, 96th Cong., 1st Sess. 1 (1979) and fn. 2 herein.

This Court stated in *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911) that judicial power "is the power of the court to decide and pronounce a judgment." It is this power that the Act explicitly gives to magistrates.

In removing the district court's de novo review and conferring the judicial power on magistrates who lack Article III attributes, Congress has struck a blow at the heart of the constitutional order.

Hamilton explained that life tenure was considered essential to the independence of the federal judiciary:

> The standard of good behavior . . . is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.
>
> . . . nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.
>
> Periodic appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.
>
> The Federalist, No. 78, 483, 487, 489 (H. Lodge ed. 1888)

See also The Federalist No. 81, 503 (H. Lodge ed. 1888) (A. Hamilton); 2 J. Story, Commentaries on the Constitution of the United States, 424 ("To the Constitution of the United States, and to those who enjoy its advantages, no judges are known but such as hold their offices during good behavior.")

Similarly, Hamilton stated concerning salary protection that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist, No. 79, 491 (H. Lodge ed., 1888) The limitation of removal to impeachment, the refusal to permit judges to be removed for inability and the refusal to provide for a mandatory retirement age were also considered important to judicial independence. *Id.*, at 493.

Because the Federal Magistrate Act of 1979 contravenes these principles it is unconstitutional.

### 2D. *Congress Has No Authority to Change Articles II & III of the Constitution*

In the name of efficiency and financial savings, Congress has attempted to change the constitutional framework of government and its system of checks and balances.

These encroachments upon the constitutional order cannot be justified. The rationale of convenience is totally inadequate. It matters not whether Congress considered the purpose of Articles II and III or the intention of the Framers of the Constitution. Congress does not have the authority to unilaterally change the Constitution.

As this Court stated in *I.N.S.* v. *Chadha*, concerning Congressional veto provisions:

> . . . the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . (at 2780-2781)
>
> . . . it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency . . . There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress, or by the President. (at 2788)

When the Constitution explicitly defines the powers or limitations of the branches of government, it cannot be changed by Congress. As this Court stated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819) "we must never forget that it is a constitution we are expounding" (at 407) in which "only its great outlines should be marked, its important objects designated" *(Id.)*. When its provisions are

explicit, they are of paramount significance to the Constitutional order and cannot be redesigned by Congress alone.

See also T. Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L. J. 297, 311 (1981) ("no general principle of constitutional interpretation permits us to avoid enforcing clearly expressed limits on legislative powers simply because we may believe history shows those limits to be unnecessary. Indeed, this is what a written constitution is all about: one takes the shortsightedness together with the wisdom until that document is amended", at 306).

While Congress incorrectly assumed that its Act was consistent with the Constitution (see pp. 21-23 herein), the courts which have sustained the constitutionality of the Act have suggested that constitutional infirmities can be cured as long as Congress attempts to meet the intentions of the Framers of the Constitution.[8] This analysis is a fundamental misconstruction of the purpose and authority of the Constitution.

Central to the role of the Constitution as the governing law of the nation is the principle that the framework of government, the separation of powers and the checks and

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[8] The *en banc* Panel in *Pacemaker* permitted the change in the express provisions of the Constitution because it concluded that the statute "contains sufficient protection against the erosion of judicial power to overcome the constitutional objections leveled against it", *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir., 1984). *In Collins* v. *Foreman*, 729 F.2d 108 (2d Cir., 1984), the Second Circuit upheld the change in the provisions of the Constitution by finding that they did not injure the underlying intent of the Framers to create an independent judiciary. In *Wharton-Thomas* v. *United States*, 721 F.2d 922, 927 (3d Cir., 1983), the Third Circuit stated that the "separation of powers concept is not violated in the magistrate system" because Article III was intended to provide the judiciary with independence from the legislative and executive branches and the magistrates have such independence. The First Circuit permitted Congress to alter Article III because "the institutional interests of the judiciary are secured by the district court's control over both the references and the appointments, and by the availability of appeal to an Article III court", *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir., 1984).

balances created and defined in the Constitution can be changed only by a constitutional amendment. No matter what the purpose, how lofty its stated goal, or whether it seeks a new way to comply with what it perceives to be the Framers' intentions, no one branch of our government can change the Constitution. To accept any other principle is to reduce the role and authority of the Constitution from a fundamental governing cornerstone of our government to a mere statute, existing only at the pleasure of Congress. Congress has no authority to effect such a transformation in the role and authority of the Constitution.

This assault upon the role and authority of the Constitution is far more pervasive than the attempt this Court rejected in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In *Northern Pipeline*, the issue was to what extent Congress was limited by Article III when it sought to carry out federal policy pursuant to the authority given Congress elsewhere in the Constitution. (See Justice White, dissenting, at 94.) The Court required that, at a minimum, the adjudication of state common-law actions (the case before it) cannot be transferred by Congress to non-Article III decisionmakers.

In *Northern Pipeline*, no infringement upon the appointment power of the President and the confirmation power of the Senate was present. Bankruptcy judges were to be appointed by the President and confirmed by the Senate. (at 53) Their term, although its longevity was not a permissible substitute for life tenure, was 14 years—considerably longer than that granted to magistrates.

Nevertheless, the Court found the delegation of powers to bankruptcy judges unconstitutional. The plurality objected to the lack of any "limiting principle" that authorized a "wholesale assignment" of cases to non-Article III judges. (at 73) The concurring opinion refused to permit a common-law claim to be so decided. (at 89-92)

The Magistrate Act goes far beyond the infringement upon the Constitution in *Northern Pipeline*. It truly has no limiting principle and is intended to affect a wholesale

transfer of cases from Article III judges to magistrates without regard to the nature of the cases involved. It violates the appointment power of the President and the confirmation power of the Senate. Most important, it is based upon the novel principle that Congress can transform the purpose and importance of the Constitution so long as it attempts to effectuate what it perceives the intent of the Framers to have been. This attempted erosion of the Constitution must be rejected pursuant to the principles of *Northern Pipeline*.[9]

### 3. *The Arguments Made in Support of the Magistrate Act of 1979 Do Not Justify the Constitutional Infirmities*

Congress, several commentators, and the First, Second, Third and Ninth Circuits have recognized at least some of the constitutional objections to the Magistrate Act of 1979. They have, however, accepted several arguments as sufficient justifications for the changes made by the Act. None of these arguments justifies the unilateral changes in the Constitution sought to be made by Congress.

Three of the contentions were first set forth in support of the Magistrates Act of 1968 which permitted magistrates to try minor offenses. When the Act was amended in 1979 to provide the magistrates with case dispositive jurisdiction in civil actions, these reasons were reiterated by Congress in support of the Act. Congress relied upon the arguments that: (1) the magistrate was an adjunct of the district court; (2) the litigants consent to the reference; and (3) an appeal lies to an Article III court. H. R. Rep. No. 287, 96th Cong., 1st Sess. 8-9 (1979).[10]

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[9] See also the dissent in *United States* v. *Raddatz*, 447 U.S. 667 (1980), which objected to the previous delegation of power to magistrates, even with de novo review by the district courts. ("[T]he replacement of Article III judges with magistrates, even if the replacement extends only to finding of facts, erodes principles that strike near the heart of the constitutional order, at 714.)

[10] Assistant Attorney General Fred M. Vinson, Jr. testified in 1966 that the proposed trial of minor offenses by magistrates would be unconstitutional because magistrates would be exercising the judicial power of the United States, but they would not be judges.

These arguments were then, in turn, relied upon by two of the commentators who argued that the Act was constitutional.[11]

Two of these arguments, however, the sufficiency of Article III appellate review, and the adjunct theory, were rejected by the subsequent decisions of this Court in *Northern Pipeline* and *United States* v. *Raddatz*.[12]

Nevertheless, despite the analysis set forth in *Northern Pipeline and Raddatz*, the courts which have sustained the Act have continued to rely upon the three reasons set forth by Congress. Additionally, these courts have argued in substance that so long as Congress acts in accordance with what it perceives the Framers' intentions to have been, it may by statute, change the Constitution.

In *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir., 1983), the Third Circuit held that the Act is not unconstitutional based upon: (1) litigant consent; (2) the argument that the magistrate is an adjunct because he is appointed by the district court and the reference may be cancelled by the district court judge; and (3) the availability of an appeal to an Article III court.

The Ninth Circuit, en banc, reversed the original *Pacemaker* panel and found the Act constitutional, *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir., 1984) (en banc) *reversing* 712 F.2d 1305 (9th Cir., 1983). The Ninth Circuit cited the opinion of Congress concerning constitutionality and *Wharton-Thomas*. (at 542) It relied in part on litigant consent, the adjunct argument, and the availability of appeal to an Article III Court, and in part on its theory that so long as Congress acts in accordance with what it perceives to be the intent of the Framers,

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Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judiciary Machinery of the Senate Comm. on the Judiciary, 89 Cong., 2d Sess. and 90th Cong., 1st Sess. 123-126 (1966-1967).

[11] P. McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. on Legis. 343, 366-374 (1979); Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973).

[12] See pp. 22-23 herein.

it may change the way in which the Framers sought to achieve that intent.

In *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir., 1984), the Second Circuit found the Act constitutional, citing *Wharton-Thomas*, *Pacemaker* and the opinion of Congress. The Court relied upon litigant consent and the adjunct argument. It set forth its own version of the *Pacemaker* theory that so long as an Act of Congress is true to what is perceived to be the Framers' intent, it need not conform to the constitutional provisions designed to achieve that goal. (at 115)

In *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir., 1984), the First Circuit placed primary reliance on *Wharton-Thomas* in holding the Act to be constitutional. (at 34-36) The Court relied upon: (1) the availability of an appeal to an Article III court; (2) an adjunct argument; and (3) litigant consent.

**3A.** ***Availability of Appeal to an Article III Court***

Congress, *Wharton-Thomas*, *Pacemaker* and *Goldstein* relied in part on the availability of an appeal to an Article III court as a saving feature to permit magistrates to exercise the judicial power of the United States even though they are not Article III judges.

The Congressional opinion preceded this Court's disapproval of this argument in *Northern Pipeline*. *Wharton-Thomas*, *Pacemaker*, and *Goldstein* nevertheless proceeded to accept the argument without discussing its disapproval in *Northern Pipeline* even though that disapproval had been relied upon by the original *Pacemaker* panel in holding the act unconstitutional. (712 F.2d at 1313)

In *Northern Pipeline* both the plurality and concurring opinions rejected the argument that the availability of an appeal to an Article III court was sufficient compliance with Article III.

The plurality opinion explained that:

> Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some

> degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The judges, *both* of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall . . . receive [undiminished] Compensation." Art. III, §1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of the adjudication, and not only on appeal . . . at 86 (fn. 39). See also fn. 28 at 74 and concurring opinion at 91.

See also Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L. J. 297 (1981) ("The 'appellate review' argument, like the 'due process' argument, presumes that because the values the Framers sought to promote can be protected in other ways, we may disregard the Framers' specific requirements. . . . The argument is no more than a frontal assault on the constitutional requirements of tenure and salary protection for 'Judges, *both* of the supreme and inferior Courts' ", at 307); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat) 738, 822 (1824).

**3B.** ***Magistrate as an Adjunct of the District Court***

The reasoning set forth by Congress in 1968—and reiterated in 1979—that the magistrate could exercise the judicial power of the United States because he was an adjunct of the district court, "appointed by the court and subject to the court's direction and control" [H. R. Rep. No. 287, 96th Cong., 1st Sess. 8-9 (1979)]—is contrary to the analysis of this Court in *Raddatz* and *Northern Pipeline*. Nevertheless, the Congressional reasoning was accepted in *Wharton-Thomas*, *Pacemaker*, *Collins* and *Goldstein*.

The First Circuit in *Goldstein* found that Article III was satisfied because magistrates are appointed and removed by the district court and because "all references of cases to them must be approved by Article III judges and the references may be revoked at any time." (at 35-36) Even

so, the First Circuit acknowledged that the removal of de novo review by the district court, in the 1979 Act, which had been present in the Act considered in *Raddatz,* raised a question as to the soundness of its adjunct argument. ("If the magistrate's authority to enter final judgment here were not limited to cases referred with consent of the parties, we would find this difference troubling indeed." at 35)

In *Raddatz* the magistrate was subject to de novo review by the district court. He acted "subsidiary to and only in aid of the district court". (at 681) This court held that such "delegation does not violate Art. III *so long as the ultimate decision is made by the district court.*" (at 683) (emphasis added)

In *Northern Pipeline* this Court rejected the argument that the bankruptcy court was a mere adjunct of the district court. The Court considered the question "whether the Act has retained 'the essential attributes of the judicial power,' *Crowell* v. *Benson* [285 U.S. 22] at 51, in Art. III tribunals" (at 77) and relied upon *Raddatz* in holding that it had not. The Court stated concerning *Raddatz* that:

> . . . the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. . . . Under these circumstances the Court held that the Act did not violate the constraints of Art. III. . . . (at 79)

> . . . the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. . . . [I]n refusing to invalidate the Magistrates Act at issue in *Raddatz,* the Court stressed that under the congressional scheme "'[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge,'" . . . (at 81)

> Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. . . . (at 83)

The Court rejected the adjunct argument in *Northern Pipeline* because it found bankruptcy judges were exercising "all 'essential attributes' of the judicial power of the United States." (at 84-85) The Court found that: (1) the bankruptcy court's subject matter jurisdiction was wide in scope; (2) the bankruptcy court exercised *all* of the jurisdiction conferred upon the district courts; (3) "the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials"; (4) the judgment was reviewable only under the limited appellate standard; and (5) bankruptcy courts issued final judgments. These five factors distinguished bankruptcy judges from the magistrate in *Raddatz* and the agency in *Crowell* v. *Benson,* 285 U.S. 22 (1932).

The Federal Magistrate Act of 1979 provides magistrates with the five elements of judicial power that precluded bankruptcy judges from being considered mere adjuncts of the district court in *Northern Pipeline.* It also grants magistrates the authority to make the final decision, without de novo review by the district court, and thereby exceeds the permissible limits of *Raddatz.*

The cases holding the Act constitutional also conflict with *Harding* v. *Kurco, Inc.,* 603 F.2d 813 (10th Cir., 1979) and *Reciprocal Exchange* v. *Noland,* 542 F.2d 462 (8th Cir., 1976), which held under predecessors of the 1979 Act that magistrates could not direct the entry of a final judgment because that authority was a "fundamental and exclusive power of an Article III judge." (*Harding* at 814)

There is no doubt that this expansion of the magistrate's authority was what Congress intended. It was the express intention of Congress to provide magistrates with "explicit authorization to finally decide civil cases" [H.R. Rep. No. 287, 96th Cong., 1st Sess. 1 (1979), Sen. Rep. No. 74, 96th Cong., 1st Sess. 4 (1979), *reprinted in* U.S.C. Cong. & Admin. News, 96th Cong., 1st Sess. 1469, 1473 (1979)] and to permit them "to sit in lieu of . . . district court judge[s]." [Advisory Committee Note of 1982, Federal Rule of Civil Procedure 73, 90 F.R.D. 498 (1982)]. See fn. 2 herein.

Under these circumstances, magistrates cannot be considered adjuncts of the district court.

See also Constitutional Bankruptcy Courts, Staff Report of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 56 (1977) (letter of Professor Thomas Krattenmaker to Chairman Rodino, "If the Constitution requires that a matter be heard by an Article III judge, I would simply assume that this means he, not his delegate, could hold jury trials or punish for contempt or enter final judgments. Otherwise, such a constitutional rule would have no independent significance."); Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 589, 590 (1980); H. Rep. No. 1364, 95th Cong., 2d Sess. 37 (1978) (dissenting views of Reps. Drinan & Kindness).

The fact that magistrates are appointed and may be removed by the district court and that a reference may be revoked by the district court does not meet the test of *Northern Pipeline* (at 83). While these elements do generally restrict the independence the Constitution was intended to provide those judges who exercise the judicial power of the United States, they do not constitute supervision sufficient to meet the requirements of *Raddatz* and *Northern Pipeline.*

The selection element is irrelevant to the question of whether the magistrate is exercising the judicial power as is the authority to remove for misconduct or incompetence. The power of the President to appoint and the Senate to confirm hardly makes district court judges adjuncts of the President or the Senate. It has no more effect when exercised by judges.

Similarly, the power to vacate a reference is in the vast majority of cases, only theoretical. It is not exercised. For all practical purposes, once a reference is made, it is not reviewed.

Moreover, even if the district courts desired to review every reference, their authority to do so would be limited.

One of the express purposes of Congress in amending the Act was to limit the authority of the district court to control such references. (H. R. Rep. No. 287, 96th Cong., 1st Sess. 3 ((1979)

The power to cancel a reference [§636(c)(6)] was intended solely for "extraordinary circumstances" [Sen. Rep. No. 74, 96th Cong., 1st Sess. 14 (1979), *reprinted in* U.S.C. Cong. & Admin. News, 96th Cong., 1st Sess. 1469, 1483 (1979). "This removal power is to be exercised only where it is appropriate to have the trial before an article III judicial officer because of the extraordinary questions of law at issue and judicial decisionmaking is likely to have a wide precedential importance." *Id.*] See also Moore's Federal Practice (2d ed.) ¶73.05 ("The pressures of crowded dockets are serious enough in all regions of the country to make the use of the power to vacate a consensual trial reference a rarely exercised authority.")

**3C. *Litigant Consent***

Litigant consent was the third argument relied upon by Congress and it was also relied upon in *Wharton-Thomas*, *Pacemaker*, *Collins* and *Goldstein*.

This issue has never directly been addressed by this Court. However, the role of Articles II and III as well as related discussion in other cases of this Court rebut the contention that litigant consent can cure this type of constutional infirmity.

The issue has five elements: (1) Article III creates only a due process right for the litigant, which can be waived; (2) there is Supreme Court precedent sustaining such consensual exercises of judicial authority by non-Article III judges; (3) arbitration is analogous; (4) the Act protects the voluntariness of the consent; and (5) the procedure permitted in *Goldstein* adequately protected the voluntariness of consent. In accepting the fifth element, *Goldstein* conflicts with *Glover* v. *Alabama Bd. of Corrections*, 660 F.2d 120 (5th Cir., 1981).

**3C(1). *Article III Creates More Than a Due Process Right***

In order to permit litigant consent to cure what would otherwise be a violation of the express terms of Article III, the First Circuit in *Goldstein* held that Article III created only a due process right which could be waived.

This analysis is fundamentally wrong. Most of the constitutional rights of individual liberty are stated in the constitutional amendments. The body of the Constitution itself was "principally an exercise in applying the concepts of federalism and separation of powers to the new American nation." [Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L. J. 297, 302 (1981).] "Each department is dealt with in a separate Article", which defines and distributes the powers of each branch of government. [*Evans* v. *Gore*, 253 U.S. 245, 247 (1920)] This portion of the Constitution does much more than create due process rights in litigants and it cannot be altered by the consent of an individual.

*Patton* v. *United States*, 281 U.S. 276 (1930) in permitting a waiver of the right to a jury trial, emphasized that the right of trial by jury was intended by the Framers for the benefit of the accused; not as a part of the frame of government. (at 297) The Court viewed the question as:

> Is the effect of the Constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guarantee to the accused the right to such a trial. (at 293)

Only because the right was personal to the accused, and not part of the frame of government, did the Court permit an individual to waive it.

Articles II and III establish the framework of the government and define the separation of powers. They are not intended primarily for the benefit of an individual litigant, *Evans* v. *Gore*, 253 U.S. 245 (1920) (the primary purpose of the prohibition against the diminution of judges' salary was to benefit the public by promoting "that independence

of action and judgment which is essential to the maintenance of the guarantees, limitations and pervading principles of the Constitution . . ." at 253); The Federalist No. 78, p. 483 (H. Lodge ed.) (A. Hamilton).

The provisions of Articles II and III are the fundamental cornerstones of our government. They can be changed only by a constitutional amendment. The establishment of the judiciary can no more be changed by an individual, than could the President be removed by the consent of those individuals who elected him. Where the framework of the government is set forth, as it is in Articles II and III, consent by an individual can confer no authority on Congress to change the Constitution.

Although this Court has not addressed this issue in an Article III context, its prior decisions indicate that Article III creates more than a mere due process right in a litigant. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), the Court found no constitutional infirmity because the judges of the Court of Claims and the Court of Customs and Patent Appeals were Article III judges. Although there was no basis for a due process objection, the Court still found it necessary that there be an Article III judge. If the right to an Article III judge was only a due process right, the Court would have terminated its discussion by noting the fair proceedings. See, Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L. J. 1023, 1035 (1979).

Similarly, in *Raddatz*, the Court noted that the conduct of suppression hearings by magistrates satisfied due process by providing a hearing appropriate to the nature of the case (at 677-81). If Article III created merely a due process right in the litigant, the Court's inquiry would have ended. Instead, the Court discussed the Article III objection and rejected it, finding that Article III was satisfied where "the ultimate decision is made by the district court." (at 683)

See also *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (courts that are not constitutional courts "are incapable of receiving" the judicial power conferred

by the Constitution); Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 595 (1980); H. R. Rep. No. 1364, 95th Cong., 2d Sess. 38 (1978) (dissenting views of Reps. Drinan & Kindness); Hearings on S. 3474 and S. 945 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 109 (1966) (Statement of Assistant Attorney General Fred M. Vinson, Jr.) ("the bill attempts to cure this constitutional objection by requiring a waiver from the defendant. We are of the opinion that a waiver in this situation is a nullity. We are here concerned basically with subject matter jurisdiction which cannot be waived. Since Article III was designed to protect the interest of the public at large in the integrity of the judicial process, trial by an Article III judge is guaranteed and cannot be waived by an individual defendant.")

**3C(2). *Supreme Court Precedent***

Four Supreme Court cases have been relied upon as arguably establishing precedent that, with litigant consent, non-Article III decisionmakers may exercise the judicial power of the United States. *Kimberly* v. *Arms*, 129 U.S. 512 (1889) (cited in *Wharton-Thomas*, *Pacemaker*, *Collins* and *Goldstein*), *Heckers* v. *Fowler*, 69 U.S. (2 Wall) 123 (1864) (cited in *Wharton-Thomas*, *Pacemaker* and *Goldstein*), *Alexandria Canal Co.* v. *Swann*, 46 U.S. (5 How) 83 (1847) (cited in *Wharton-Thomas* and *Pacemaker*) and *Newcomb* v. *Wood*, 97 U.S. (7 Otto) 581 (1878) (cited in *Pacemaker*) are the cases relied upon.

This reliance is misplaced. No issue relating to Article III or the separation of powers was raised or discussed in any of these cases. As the dissent stated in *Pacemaker*, "[i]t elevates these cases beyond their historical context to argue that they constitute Supreme Court approval for the wholesale delegation of Article III judicial power to non-Article III judges." (725 F.2d at 550 fn. 1)

Moreover, even if the issue had been addressed, no support for a non-Article III judiciary could be drawn from

the conclusions. In each case (as in *Raddatz*) an Article III judge was required to review the findings of the arbitrator or master.

In *Heckers* and *Alexandria Canal*, the references to the arbitrators were made pursuant to rules that permitted objections to the awards to be made before the court. Only because the losing parties made no objection to the awards pursuant to the rules were they accepted by the courts. Additionally, in *Alexandria Canal*, the District of Columbia Court acted as a local court applying Maryland procedural law, not as an Article III Court. See *Alexandria Canal* at p. 86. See also *Kendall* v. *United States*, 12 Peters 524, 619 (1838), *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 443 (1923) and *Palmore* v. *United States*, 411 U.S. 389, 405 (1973).

In *Kimberly*, the master's report was required to be reviewed by the Court. (*Kimberly*, at 524) The appellant (who objected to the lack of weight given the findings by the trial court) did not argue that no review should take place, only that the burden of sustaining an exception should be on the objecting party, citing *Medsker* v. *Bonebrake*, 108 U.S. 66 (1882) (Brief for Appellant at 92, 96-97, *Kimberly* v. *Arms*). See also Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 593 (1980).

*Newcomb*, like *Kimberly*, involved a reference to a referee over whom the district court did exercise review and direct the entry of final judgment.

**3C(3). *The Analogy of Arbitration***

*Goldstein* placed great reliance on an analogy to arbitration in holding that litigants could consent to permit a magistrate to act as a judge. It held that there was "no significant difference between arbitration and consensual reference for decision to magistrates" from a constitutional viewpoint. (at 36)

The analogy is inapposite. A litigant can choose an arbitrator or a state court judge who is not an Article III

judge without any constitutional infirmity because the Constitution does not require that these decisionmakers be Article III judges. They do not exercise the judicial power of the United States.

This Court has emphasized that arbitration is an alternative to judicial resolution. See *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 567-569 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, 581 1960); *Wilko* v. *Swan*, 346 U.S. 427, 433 (1953); *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 202-203, (1955); and *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506 (1974). Arbitrators do not exercise the judicial power of the United States. See also *Bremer Vulkan* v. *South India Shipping*, [1981] 1 All E.R. 289, illustrating the fact that given international contacts, arbitration becomes the alternative to the judicial authority of several states.

**3C(4). *The Act Does Not Ensure Voluntary Consent***

The consent itself is of an illusory nature.

Institutionally, Congress by appointing magistrates instead of sufficient Article III judges, has required a class of litigants to consent. See H. R. Rep. No. 1364, 95th Cong., 2d Sess. 35 (1978) (dissenting views of Reps. Drinan & Kindness); Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L. J. 1023, 1050 (1979).

On an individual level, there is no reason to choose a magistrate instead of an Article III judge except to avoid delay. Only because sufficient judges have not been appointed does such a choice seem desirable. This constitutes pressure to consent.

As Representative Holtzman stated in opposing the Act:

> It is unlikely that a litigant will hold out for an Article III judge when he or she is poor or denied bail or badly in need of the money sued for and is told by an attorney that with a magistrate the trial will be scheduled sooner and conducted more expeditiously . . .

H. R. Rep. No. 287, 96th Cong., 1st Sess. 31 (1979) (dissenting views). See also J. Aug, Jr., The Magistrate Act of 1979: From a Magistrate's Perspective, 49 Cinn. L. Rev. 363, 368 (1980) ("In sum, it is doubtful whether the Act and the local rules promulgated thereunder will genuinely ensure the voluntariness of the parties' consent to a magistrate.")

**3C(5). *The Procedure Permitted in Goldstein Violates the Statute***

In *Goldstein*, contrary to the provisions of 28 U.S.C. §636(c)(2) authorizing consensual reference, the clerk did not inform the parties of the right to consent to the reference. Instead, the judge directly asked the parties.

Edna Goldstein, a terminal cancer patient, chose the fastest trial.

In sustaining this procedure, the First Circuit's decision conflicts with *Glover* v. *Alabama Bd. of Corrections*, 660 F.2d 120 (5th Cir., 1981), which required compliance with §636(c)(2) to permit a consensual reference.

Congress emphasized that the blind consent provision was necessary to prevent a judge from inducing consent. H.R. Rep. No. 287, 96th Cong., 1st Sess. 11 (1979) ("The response of a party is not to be conveyed to the district judge, and the district judge is not to attempt any inducement, subtle or otherwise, to encourage magistrate trials."); Sen. Rep. No. 74, 96th Cong., 1st Sess. 14 (1979), *reprinted in* U.S.C. Cong. & Admin. News, 96th Cong., 1st Sess. 1469, 1482 (1979); H.R. Conference Rep. No. 444, 96th Cong., 1st Sess. 8 (1979), *reprinted in* U.S.C. Cong. & Admin. News, 96th Cong., 1st Sess. 1487, 1489 (1979).

See also Federal Rule of Civil Procedure 73(b) (which did not become effective until August 1, 1983—four months after the *Goldstein* reference); Moore's Federal Practice (2d ed.) ¶¶73.03[5]-73.03[6]; C. Wright, A. Miller & F. Elliott, 12 Federal Practice & Procedure §3077.3 (1983 Supp.) ("Section 636(c)(2) removes from the purview of the judge the entire process leading up to consent or refusal of consent so that the judge will not know that a particular party opposed the reference.")

In violation of the statute, the reference in *Goldstein* was initiated by the judge.

### 3D. *Conformity to the Framers' Intent Does Not Permit Changes in the Constitution*

In attempting to support the other arguments in defense of the Act, the courts sustaining the constitutionality of the Act have argued in substance that, while the Act may not conform to Article III, a deviation is permitted because the Act secures the Framers' intent of creating an independent judiciary. (See fn. 8 herein.)

While this analysis is incorrect (pp. 15-18 herein), it should also be noted that this argument inaccurately oversimplifies the Framers' intent.

The Framers did seek to create a judiciary independent from Congress. However, they also sought to prevent an alliance between the judiciary and Congress (See *United States* v. *Raddatz, supra,* (Marshall dissenting) at 706 n.6). They further sought to make the judges independent of influence from any source and to avoid the limits inherent in limited tenure. The Federalist No. 81, 503 (H. Lodge ed. 1888) (A. Hamilton); *Id.,* No. 78, 483, 487, 489 (A. Hamilton); *Evans* v. *Gore,* 253 U.S. 245, 253 (1920). These values are endangered by the Act.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SKIP SHORT
*Counsel of Record*
SHORT & BILLY
275 Madison Avenue
New York, New York 10016
(212) 679-8400

JOHN GRANARA
5 High Street
Medford, Massachusetts 02155
(617) 391-7000

Dated: June 29, 1984

# APPENDIX

## Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 83-1411

---

EDNA GOLDSTEIN,

*Plaintiff-Appellant,*

v.

ROBERT E. KELLEHER, ET. AL.,

*Defendants-Appellees,*

UNITED STATES OF AMERICA,

*Intervenor.*

---

Before:

CAMPBELL, *Chief Judge,*
ROSENN,* *Senior Circuit Judge,*
COFFIN, BOWNES and BREYER, *Circuit Judges.*

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ORDER OF COURT

Entered: April 3, 1984.

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the court who are in regular active service; and,

The judges of the panel having voted to deny the petition for rehearing, and the judges of the court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court,

Francis P. Scigliano
Clerk.

[Messrs. Short and Anderson.]

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* Of the Third Circuit, sitting by designation.

**Decision of the United States Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 83-1411

---

EDNA GOLDSTEIN,

*Plaintiff-Appellant,*

v.

ROBERT E. KELLEHER, ET. AL.,

*Defendants-Appellees,*

UNITED STATES OF AMERICA,

*Intervenor.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert J. DeGiacomo, *U.S. Magistrate*]

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Before:

CAMPBELL, *Chief Judge,*
ROSENN,* *Senior Circuit Judge,*
and BOWNES, *Circuit Judge.*

*Skip Short,* with whom *Short & Billy* and *John Granara* were on brief, for appellant.

*James H. Anderson,* with whom *Douglas Danner,* and *Powers & Hall Professional Corporation* were on brief, for appellees.

*Michael F. Hertz,* Attorney, Appellate Staff, Civil Division, Department of Justice, with whom *J. Paul McGrath,* Assistant Attorney General, *William F. Weld,* United States Attorney, and *Peter R. Maier,* Attorney, Appellate Staff, Civil Division, Department of Justice, were on brief, for intervenor.

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* Of the Third Circuit, sitting by designation.

February 29, 1984

*Decision of the United States Court of Appeals*

CAMPBELL, *Chief Judge.* Edna Goldstein brought a diversity action in the district court against Dr. Robert Kelleher and the Rockdale Medical Corporation ("Rockdale"). She claimed medical malpractice and lack of informed consent stemming from a breast reduction operation performed by Dr. Kelleher in February 1978. At the trial, it was shown that Dr. Kelleher had repeatedly sliced through a previously undetected tumor in plaintiff's left breast and had completed the operation on both breasts notwithstanding his discovery.

After the surgery, plaintiff refused to undergo conventional medical treatment for cancer, allegedly because the mishap had induced a fear of the medical community. Instead she travelled to Mexico for alternative treatment, including laetrile. In 1981 plaintiff agreed to conventional treatment, but in the intervening three years the cancer had spread throughout her upper body.

Mrs. Goldstein's jury trial was conducted in the District of Massachusetts before a United States magistrate, with the express consent of the parties, as provided for in section 636(c)(3) of the Federal Magistrates Act. 28 U.S.C. §636(c)(3). The jury rendered a verdict in the form of yes-no responses to certain written questions. These responses indicated findings that Dr. Kelleher was negligent in his treatment of the plaintiff but that his negligence did not cause her injuries or damage. The magistrate (who earlier had directed a verdict on plaintiff's informed consent claim) entered judgment for the defendant. Plaintiff appeals from both the adverse judgment and the denial of her motion for a new trial.

I.

In her reply brief, plaintiff contended for the first time that the consensual trial before the United States magistrate was unconstitutional and therefore a nullity. She urges us to adopt the view of a panel of the Ninth Circuit that section 636(c)(3)'s delegation of power to magistrates to conduct consensual jury and non-jury trials and enter

judgments, without de novo review by a district judge, offends Article III of the federal Constitution. *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983). However, this panel's decision was recently reversed by the Ninth Circuit sitting en banc, by vote of eight of the eleven judges who sat. *Pacemaker*, Nos. 82-3152, 82-3182 slip op. (9th Cir. Feb. 16, 1984).

We agree with the en banc decision of the Ninth Circuit and with an earlier decision of the Third Circuit that section 636(c)(3) is not unconstitutional. *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). As we find little to add to Judge Weis's thorough discussion in *Wharton-Thomas*, we rely in particular on the reasoning in that case, but with the following observations.

Magistrates—unlike the bankruptcy judges whose expanded jurisdiction was struck down in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)—are appointed and removed by Article III judges. 28 U.S.C. §631(a) and (i). Further, all references of cases to them must be approved by Article III judges and the references may be revoked at any time. 28 U.S.C. §636(c)(1) & (6). Magistrates are thus in large measure shielded from coercion by the executive or legislative branches and from improper societal influences by the Article III salary and tenure safeguards pertaining to the judges under whose control they serve. The *Marathon* plurality itself stated, as regards magistrates, that there is "no serious threat that the exercise of the judicial power would be subject to incursion by other branches." 458 U.S. at 79 n.30.

There is, nonetheless, one major difference between the authority conferred upon the magistrate here and that conferred in past cases where the Supreme Court has approved the delegation. In past cases the ultimate decision-making power remained with the district judge. *United States* v. *Raddatz*, 447 U.S. 667, 681 (1980). See *Marathon*, 458 U.S. at 83. In *Raddatz*, for example, the magistrate's recommended disposition went to the district judge for de novo consideration and entry of judgment. If the magis-

trate's authority to enter final judgment here were not limited to cases referred with consent of the parties, we would find this difference troubling indeed.

But insofar as Article III protects individual litigants, those protections can be waived. *Cf. Patton* v. *United States,* 281 U.S. 276, 281 (1930) (waiver of sixth amendment guarantee of trial by jury). The plaintiff as well as the defendant here voluntarily consented to have this action handled through to judgment by a magistrate. They gave their consent pursuant to procedures designed to insulate this choice from influence by either the district judge or the magistrate. 28 U.S.C. §636(c)(2).

*Raddatz,* to the contrary, involved a non-consensual reference to a magistrate. 447 U.S. at 669. Similarly *Marathon* involved a non-consensual determination of a party's state law claim by an Article I bankruptcy judge. As Justice Rehnquist stated, "None of the cases has gone as far as to sanction the type of adjudication to which Marathon will be subjected *against its will* under the provisions of the 1978 Act." 458 U.S. at 91 (Rehnquist, J., concurring) (emphasis added). The only holding supported by a majority of the justices was that the ability of "a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* was violative of Art. III of the United States Constitution." 458 U.S. at 91 (Rehnquist, J., concurring (emphasis added). We therefore agree with the Third Circuit that *Marathon* and *Raddatz* do not go so far as to suggest that a purely consensual reference is unconstitutional even though the magistrate retains the power to enter judgment. *Wharton-Thomas* v. *United States,* 721 F.2d at 928. This is especially so where, as previously mentioned, both the reference and the magistrate are under direct control of an Article III court.

The importance of the consensual aspect of the arrangement is emphasized by early Supreme Court decisions upholding consensual grants of authority to masters and referees. *Kimberly* v. *Arms,* 129 U.S. 512 (1889); *Heckers* v. *Fowler,* 69 U.S. (2 Wall.) 123 (1864). In *Heckers* v.

*Fowler* the parties to an action in federal district court agreed to refer the case to a referee "to hear and determine the same, and all issues therein, with the same powers as the court . . . and that the report of said referee have the same force and effect as a judgment of said court." 69 U.S. (2 Wall.) at 127. The district court ordered the referral and directed "that on filing the report of said referee with the clerk of the court, judgment be entered in conformity therewith, the same as if the cause had been tried before the court." *Id.* at 127. The Supreme Court rebuffed an attack on the broad reference, stating that the "[p]ractice of referring pending actions is coeval with the organization of our judicial system." Id. at 128. The Court also rejected the argument that a judgment entered by the clerk of the court was invalid. The initial order of the district court had authorized the entry of judgment on the referee's report and hence, "Judgment having been entered without objection, and pursuant to the order of the court and the agreement of the parties, it is not possible to hold that there is any error in the record." Id. at 133.

In *Kimberly* v. *Arms,* 129 U.S. at 524-25, the Supreme Court again upheld "reference of a whole case to a master" with "the power to 'decide all the issues between the parties.'" The Court held that the rulings of the master "should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made." *Id.* at 525. Thus the broad consensual reference gave the master the power of decision with only the degree of review afforded the magistrate's decision by this court in the present case.

In *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976), this circuit upheld a broad consensual reference which invested the magistrate with power to decide the case, subject only to district court review for "manifest error." In that case we held that,

> From a constitutional viewpoint, we can see no significant difference between arbitration and consensual

> reference for decision to magistrates. In both situations the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance . . . . If it be queried whether the dignity of Article III is being compromised by entering judgments on awards made by non-Article III personnel, the sufficient rejoinder is that judgments are entered on arbitrators' awards.

520 F.2d at 505-06. The review of the magistrate's award by the court of appeals under section 636(c)(3)[1] is as thorough as the review by the district court in *DeCosta*.

Believing that the Article III interests of both the litigants and the judiciary are adequately protected under section 636(c)(3), we uphold the magistrate's jurisdiction in the present instance. The litigants' interests are safeguarded by the consensual nature of the reference; the institutional interests of the judiciary are secured by the district court's control over both the references and appointments, and by the availability of appeal to an Article III court. *See Wharton-Thomas* v. *United States*, 721 F.2d at 929-30.

## II.

On the merits of the appeal, plaintiff argues the magistrate erred in granting the defendants twice as many peremptory challenges as plaintiff. The two defendants in the case are Dr. Kelleher and a professional association to which he belonged, Rockdale Medical Corporation. They were represented by a single attorney, and defendants stipulated that a verdict against Kelleher would apply against Rockdale. The interests of the two were indistinguishable.

The relevant statute, 28 U.S.C. §1870 provides,

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[1] Under 28 U.S.C. §636(c)(3) the decision of a magistrate can be appealed directly to the court of appeals "in the same manner as an appeal from any other judgment of a district court," while 28 U.S.C. §636(c)(4) provides for consensual appeal to the district court.

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

While the magistrate urged counsel for the defendants to limit himself voluntarily to three peremptory challenges,[2] upon defendants' insistence, the magistrate, who may have mistakenly thought the statute gave each defendant an absolute right in the matter, allowed three peremptories to each of the two defendants, for a total of six. Plaintiff was limited to three.[3] Thereafter, nine jurors were excused on the basis of peremptory challenges—by whom exercised does not appear.

Plaintiff argues that the magistrate abused his discretion by rejecting her request that the two defendants be considered as a single party and be allowed but three challenges between them. Plaintiff also points out that she asked the magistrate, in the alternative, for six challenges, to match defendants' six.

Section 1870 gave the magistrate discretion to follow either path proposed by plaintiff. We believe he should have done so given the fact that the two defendants, represented by one attorney and parties to the verdict stipulation, clearly had identical interests at the trial. If each defendant had had even colorably different interests from the other, *e.g.*, *Nehring* v. *Empressa Lineas Maritimas Argentinas*, 401 F.2d 767 (5th Cir. 1968), *cert. denied*, 396 U.S. 819 (1969); *Rogers* v. *DeVries & Co.*, 236 F. Supp. 110 (S.D. Tex 1964), we would not question the magis-

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[2] The final number of challenges was actually four instead of three per party based on allowance of an extra peremptory challenge for the alternate jurors. Fed. R. Civ. P. 47(b). Without objection, the magistrate allowed these extra challenges to be exercised against any prospective juror, not just against alternates.

[3] The defendants actually were allotted a total of eight challenges, while plaintiff was allotted four. *See* note 2, *supra*.

trate's discretion, but it is hard to see any reason here for not equalizing peremptories as between plaintiff and defendants.

It is true the statute states flatly that each party "*shall* be entitled to three peremptory challenges." (Emphasis supplied.) Multiple parties "may" be considered as one, but there is not absolute requirement. However, while the trial court's discretion under the statute is considerable, it is not unlimited. *John Long Trucking, Inc.* v. *Greear,* 421 F.2d 125 (10th Cir. 1970); *Globe Indemnity Co.* v. *Stringer,* 190 F.2d 1017 (5th Cir. 1951). Defendants argue that plaintiff brought in the Rockdale Medical Corporation simply to impress the jury, and that it was fair to saddle the plaintiff with the adverse consequences of that choice. Plaintiff, however, offered to make only minimal reference to the corporation, and we do not see that plaintiff's choice to proceed against the corporation automatically gave Rockdale an interest adverse to Dr. Kelleher. Rather, we believe this was the very kind of case for which the statute's conferral of discretion upon the court to treat several parties as one was devised. We feel constrained to hold the magistrate abused his discretion in refusing either to treat both defendants as a single party or to allow plaintiff to exercise double the number of peremptory challenges.

While, however, the challenges were wrongly allocated, plaintiff has not made a minimal showing of any prejudice. We start with the absence in the record of a showing that plaintiff exercised her four peremptories. Since only nine jurors were excused on the basis of peremptories, it is conjectural whether she did. It is well established in the case law that one who does not exercise all his peremptory challenges cannot assign as error the court's refusal to allow a greater number. *Connecticut Mutual Life Insurance Co.* v. *Hillmon,* 188 U.S. 208 (1903); *Kloss* v. *United States,* 77 F.2d 462 (8th Cir. 1935).

Plaintiff's attorney represents in his brief that he did, in fact, exercise all four peremptories. Counsel's representation is not an adequate substitute for a record show-

ing. *United States* v. *Gazda*, 499 F.2d 161, 164 (3d Cir. 1974); *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962, 969 (2d Cir. 1972). Even, however, were we to accept counsel's statement, we encounter other difficulties. There is nothing to show either that plaintiff was dissatisfied with any of the jurors finally selected or wished to select someone else. We think that before a reversal is granted the complaining party should be able to point to some convincing indication in the record that if a further peremptory challenge had been allowed, he meant to challenge one or more jurors. *United States* v. *Diggs*, 522 F.2d 1310, 1318 (D.C. Cir. 1975), *cert denied*, 429 U.S. 852 (1976); *Signal Mountain Portland Cement Co.* v. *Brown*, 141 F.2d 471, 477 (6th Cir. 1944); *Rogers* v. *DeVries & Co.*, 236 F.Supp. at 112. Here, while plaintiff now complains that the jury was disproportionately male (five out of six), she did not make this point at the time the jury was empanelled or otherwise suggest dissatisfaction.[4]

> Knowing the facts, [she] cannot sit idly by, make no objection, and then after a verdict [against her] is returned, challenge it upon the ground that the jury was not legally constituted and was not a valid jury.

*Zito* v. *United States*, 64 F.2d 772, 773 (7th Cir. 1933). *See also United States* v. *Diggs*, 522 F.2d at 1318. After the jury had been drawn, the magistrate asked,

> Are there any further questions from either counsel with reference to this chosen jury for the trial of this case?

Plaintiff's counsel responded, "No questions, Your Honor," and, to the question whether the parties were content, answered, "Yes."

Not only was the issue of the sex of the jurors not raised, but the record does not indicate which party challenged the

[4] Plaintiff also complains of the youth of the jury, but there is nothing in the record to show the age of its members.

three women who were disqualified. Such information would be relevant to this appeal, because if plaintiff challenged those women she could not now be heard to complain that the jury was predominantly male. *See Frazier* v. *United States*, 335 U.S. 497, 505 (1948) (defendant who used peremptory challenges to eliminate prospective jurors who were privately employed cannot challenge the panel on the ground that government employees were overrepresented). Under Fed. R. Civ. P. 61, the courts must disregard any error or defect which does not affect the substantial rights of the parties. In the absence of any indication that the jury selected was unsatisfactory to plaintiff at the time chosen, we are unwilling to reverse the verdict of a jury that to all appearances was disinterested, competent and suitable. *Matanuska Valley Lines* v. *Neal*, 255 F.2d 632, 636 (9th Cir. 1957); *Local 36 International Fishermen* v. *United States*, 177 F.2d 320, 342 (9th Cir. 1949), *cert. denied*, 339 U.S. 947 (1950).

III.

Plaintiff next argues that the magistrate should have granted a new trial because the jury's verdict of no damages was against the weight of the evidence. In reviewing a denial of such a motion, "the trial court will be found to have abused its discretion only if it refused to grant a new trial when the verdict was against the clear weight of the evidence." *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334, 351 (1st Cir. 1980), *cert. dismissed*, 449 U.S. 1135 (1981).

Damages are an element of plaintiff's case and must not be merely speculative. *Newton* v. *Backwood & Co.*, 261 F.Supp. 485, 488 (D. Mass. 1966), *aff'd*, 378 F.2d 315 (1st Cir. 1967); *Lufkin's Real Estate, Inc.* v. *Aseph*, 349 Mass. 343, 208 N.E.2d 209 (1965). Further, a plaintiff "may not recover for damages that were avoidable by the use of reasonable precautions on his part." *Burnham* v. *Mark IV Homes, Inc.*, 387, Mass. 575, 586, 441 N.E.2d 1027, 1034 (1982); *see also Fairfield* v. *Salem*, 213 Mass. 296, 100 N.E.

542 (1913). The jury was instructed on plaintiff's duty to mitigate and based on the evidence in the case, including the testimony that the cancer had already spread to plaintiff's lymphatic system at the time of the surgery, the jury could reasonably have concluded that despite Dr. Kelleher's negligence, the spread of the cancer was not exacerbated by the tumor slicing. Further, the jury may have found that any injury could have been eliminated by prompt conventional treatment and that plaintiff's damages were wrought by her own choice to undergo laetrile treatment in Mexico. Given expert testimony to this effect we decline to overturn the jury verdict denying plaintiff damages. Regarding plaintiff's claims of emotional injury and fear of conventional medical treatment, we uphold the jury's rejection of these highly speculative claims. *Bullard* v. *Central Vermont Rv.*, 565 F. 2d 193, 197 (1st Cir. 1977).

IV.

Finally, Plaintiff attacks the directed verdict rendered by the magistrate in favor of defendants on the informed consent claim. Plaintiff claimed that she was disappointed with the cosmetic results of the surgery. She further averred that had she been informed of the risk of a bad cosmetic result and the possible need for reconstructive surgery, she would have declined the operation. The magistrate correctly concluded that under Massachusetts law a plaintiff attempting to establish an informed consent claim must show "that had the proper information been provided neither he nor a reasonable person in similar circumstances would have undergone the procedure." *Harnish* v. *Children's Hospital Medical Center*, 387 Mass. 152, 158 439 N.E.2d 240, 244 (1982); *See also Schroeder* v. *Lawrence*, 372 Mass. 1, 5, 359 N.E.2d 1301, 1303 (1977). The magistrate recognized that plaintiff had introduced enough evidence on the reasonable person element to allow that question to be resolved by the jury, but he found no evidence had been introduced regarding plaintiff's personal position had she been fully informed. Plaintiff did not testify

at trial nor did her deposition contain any testimony as to whether she would have consented to the procedure if advised of the risks.

In order to uphold a grant of a directed verdict, we must find that, viewing the evidence in the light most favorable to the non-moving party, reasonable jurors could come to but one conclusion. *deMars* v. *Equitable Life Assurance Society,* 610 F.2d 55, 57 (1st Cir. 1979). We must give plaintiff the benefit of every legitimate inference. *Bayamon Thom McAn, Inc.* v. *Miranda,* 409 F.2d 968, 973 (1st Cir. 1969). However, such inferences may not rest on conjecture or speculation, but rather the evidence offered must make "the existence of the fact to be inferred more probable than its nonexistence." *Carlson* v. *American Safety Equipment Corp.,* 528 F.2d 384, 386 (1st Cir. 1976). Plaintiff asserts that based on evidence of her expectations of improved appearance and her disappointment in the cosmetic result, the jury could have inferred that she would not have undergone the surgery had she known the attendant risks. We agree with the magistrate that such an inference would have rested on mere speculation. Dissatisfaction with the result does not make it more probable than not that plaintiff would have declined the procedure. The issue of informed consent must rest on foresight, not hindsight. *Canterbury* v. *Spence,* 464 F.2d 772, 787 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972). Dr. Kelleher had previously performed successful cosmetic surgery on plaintiff's chin, and he admittedly told her that breast reduction was a "drastic operation" and could cause a cyst. Thus if the evidence permits any inference at all, it is that plaintiff would likely have opted to undergo the surgery even had she been completely apprised of all the risks. Absent affirmative evidence that plaintiff personally would have declined the surgery had she been more fully informed of the risks, we hold the magistrate properly refused to indulge the speculative inferences pressed by plaintiff's counsel.

Plaintiff did attempt to introduce some evidence on this point at trial. Her psychiatric expert was asked if he could form an opinion, with reasonable medical certainty, as to whether plaintiff would have consented to the operation had she been informed of the risks. A "form and foundation" objection was sustained. The expert did not know plaintiff until July 1981, three years after the surgery; nor had the expert questioned plaintiff on the issue of her prior consent. The magistrate could properly rule that an inadequate foundation had been laid to permit the expert to answer the question. We conclude that the magistrate did not abuse his broad discretion to make such relevance determinations. *United States* v. *Mehtala*, 578 F.2d 6, 9 (1st Cir. 1978). Furthermore, plaintiff made no offer of proof as required by Fed. R. Evid. 103(a)(2), and plaintiff offered no theory under which the evidence should have been admitted. *Coe* v. *Yellow Freight System, Inc.*, 646 F.2d 444, 454 (10th Cir. 1981); *Wright* v. *Hartford Accident & Indemnity Co.*, 580 F.2d 809, 810 (5th Cir. 1978). We accordingly reject the challenge to the evidentiary ruling and uphold the directed verdict.

*Affirmed.*

## Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 83-1411

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EDNA GOLDSTEIN,

*Plaintiff-Appellant,*

v.

ROBERT E. KELLEHER, ET AL.,

*Defendants-Appellees.*

UNITED STATES OF AMERICA,

*Intervenor.*

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JUDGMENT

Entered: February 29, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the court:

Francis P. Scigliano
Clerk

[cc: Messrs. Short, Anderson and Hertz]

## Judgment of the United States District Court

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
Case Title

EDNA GOLDSTEIN

v.

ROBERT KELLEHER, M.D., and ROCKDALE MEDICAL CORPORATION

District: Massachusetts

Docket Number: 81-193-T

Name of Magistrate: ROBERT J. DEGIACOMO

XX Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the answers to special questions rendered by the jury, judgment is hereby entered for the defendants.

Clerk:
GEORGE F. McGRATH

(By) Deputy Clerk

David DiMarzio

Approved as to form:

Robert J. DeGiacomo
United States Magistrate

Date: 04/14/83